LEE HOCK LAI A

v.

YEOH WAH PEIN

HIGH COURT MALAYA, ALOR SETAR B
MOHD SOFIAN ABD RAZAK J
[CIVIL APPEAL NO: 12-04-1998]
12 JULY 2009

CIVIL PROCEDURE: *Costs - Getting-up fee - Appeal to the Court of* C
Appeal from decision of the High Court - Decision in the High Court against the appellant - Whether more strenuous effort of appellant's counsel required in pursuing the appeal in the Court of Appeal - Whether such efforts justified an increase in getting-up fees of appellant's counsel

CIVIL PROCEDURE: *Costs - Interest on costs - Whether interest on* D
costs ought to be awarded from the date of judgment

CIVIL PROCEDURE: *Costs - Review of registrar's certificate -*
Principles applicable - Circumstances registrar ought to consider when E
taxing costs

The Sessions Court had allowed the plaintiff's claim. The High Court reversed and dismissed the claim on the defendant's appeal. The plaintiff appealed to the Court of Appeal. The Court of Appeal allowed the appeal, reinstated the plaintiff's claim and ordered costs. F
On taxation the Registrar awarded interest on the costs from the date of the Court of Appeal's judgment, *viz* 11 May 2004. The Registrar also awarded a sum of RM15,000 as counsel's getting-up fees. The plaintiff applied to the judge for a review of the Registrar's Certificate pursuant to O. 59 r. 36(1) of the Rules of G
the High Court 1980 ('the RHC 1980'). The plaintiff's counsel submitted that interest should have been awarded from the date of the High Court's judgment reversing the Sessions Court's decision, *viz* 12 November 1998. The plaintiff's counsel also submitted that the amount of RM15,000 for getting-up fees was too low and H
instead a sum of RM50,000 was appropriate. The plaintiff's application was resisted by the defendant.

Held (allowing the application in part):

(1) The date of interest should commence from the date of the I
Court of Appeal's judgment allowing the plaintiff's appeal to reinstate his claim which had been struck out by the High Court. The judgment of the Court of Appeal was made on

A 11 May 2004. Thus, interest should be calculated from 11 May 2004 rather than from 12 November 1998. *Liau Kim Lian v. Bajuria* (foll); *Gooi Hock Seng v. Chuah Guat Khim* (foll); *Kerajaan Negeri Johor & Another v. Adong Kuwau & Ors* [2002] (foll). (paras 33, 34 & 35)

B

(2) The quantum of costs for getting-up fees should not be changed unless there is an error in principle on the part of the taxing registrar in fixing the amount. The costs to be awarded are at the discretion of the learned Deputy Registrar, who shall
C have regard to all relevant circumstances, in particular, those set out under para. 1(2), part X, Appendix 1 of the RHC 1980. In the instant case, the amount of the getting-up fees should be increased because the efforts made by the counsel for the plaintiff would have been more strenuous when appealing to the
D Court of Appeal against the decision of the High Court. Thus, the getting-up fees should be increased to RM25,000. (paras 36, 38 & 39)

Case(s) referred to:

Chan Kok Choon JP v. MBF Finance Bhd [2000] 4 CLJ 453 CA ***(refd)***

E *Gooi Hock Seng v. Chuah Guat Khim [2001] 1 CLJ 583 SC* ***(foll)***

Hunt M Dougles Roofing Ltd [1983] All ER 823 ***(refd)***

Jefford & Another v. Gee [1970] 1 All ER 1202 ***(refd)***

Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors [2002] 4 CLJ 259 FC ***(foll)***

F *Liau Kim Lian v. Bajuria [1971] 1 LNS 63 FC* ***(foll)***

Nykredit Mortgage Bank Plc v. Edward Erdman Group Ltd (No 2) [1998] 1 All ER 305 ***(refd)***

Tuan Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals [1997] 1 CLJ 463 CA ***(refd)***

G *United Malayan Banking Corp Bhd v. Sykt Perumahan Luas Sdn Bhd [1991] 1 CLJ 594; [1991] 4 CLJ (Rep) 163 HC* ***(refd)***

Vincent Cheng Kim Chuan v. The Minister for Home Affairs & Ors [1992] 2 CLJ 945; [1992] 4 CLJ (Rep) 527 HC ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 11

H Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (c), O. 40 r. 11(2), O. 42 r. 7, O. 59 rr. 34(1), 35(3), 36(1)

Rules of the Supreme Court [UK], O. 42 r. 3

I *For the plaintiff/respondent - Brijnandan Singh Bhar; M/s Brijnandan Singh Bhar & Co*

For the defendant/appellant - VK Dasaratharaj; M/s VP Nathan & Partners

Reported by Andrew Christopher Simon

JUDGMENT

Mohd Sofian Abd Razak J:

[1] Enclosure 28 is the plaintiff's summons-in-chambers to judge in - chambers pursuant to O. 59 r. 36(1) Rules of the High Court, 1980 (hereinafter called the RHC, 1980) for a review of the registrar's certificate by a judge in respect of item 27 and the interest as at 12 November 1998 till to date on the amount in the bill of costs dated 20 July 2005 which was disallowed by the learned Deputy Registrar.

[2] In the affidavit-in-support (encl. 29) by the learned counsel for the plaintiff, Mr. Brijnandan Singh Bhar *inter alia* stated that the learned Deputy Registrar erred in law and in fact when deciding that the interest on the costs should be from 11 May 2004 which was the date of the appeal at the Court of Appeal. The learned counsel for the plaintiff further stated that the learned Deputy Registrar had erred in law in not awarding the interest on the costs as allowed in the case of *Liau Kim Lian v. Bajuria* [1971] 1 LNS 63.

[3] As for the item No: 27 in the bill of costs, the award of RM15,000 for getting-up by the learned Deputy Registrar was too low and asked the said sum to be increased to RM50,000 by way of an amendment made.

[4] On 17 December 2008, the court after reading the written and hearing oral submissions from both parties, made the following order in that:

i) the interest at 8% per annum on the costs runs from 11 May 2004 which was the date of the appeal at the Court of Appeal and not from 12 November 1998.

ii) on item 27, which is the getting up fees, the amount awarded by the learned Deputy Registrar of RM15,000.000 is increased to RM25,000.

[5] Following the said decision, both the plaintiff and the defendant have filed the respective Notices of Appeal to the Court of Appeal.

[6] Before I deal with the review of the Registrar's Certificate on the interest and on the getting up fee in item 27, it would be wise at this juncture to quote in verbatim O. 59 r. 36(1) RHC, 1980 for easier reference.

[7] Order 59 r. 36(1) RHC, 1980:

> Any party who Is satisfied with the decision of the Registrar to allow or to disallow any item in whole or in part on review under rule 34 or 35, or with the amount allowed in respect of any item by the Registrar on any such review, may apply a Judge for an order to review the taxation as to that item or part of an item, if, but only if, one of the parties to the proceedings before the Registrar requested the Registrar in accordance with rule 35(3) to state the reasons for his decision in respect of that item or part on the review.

[8] The learned Deputy Registrar in the Registrar's Certificate pursuant to O. 59 r. 35(3) RHC, 1980 on the review by the registrar pursuant to O. 59 r. 34(1) in particular on the interest and the getting-up fees stated that based on the cases of *Liau Kim Lian v. Bajuria (supra)* and *Gooi Hock Seng v. Chuah Guat Khim* [2001] 1 CLJ 583 which held that:

> Interest is payable where an order directs payment of costs to be taxed, and a judgment for damages to be assessed or for costs to be taxed carries interest from the date of entry of judgment and not from the date of the assessment of taxation.

[9] The learned Deputy Registrar held that in the instant case, the court is empowered to allow interest at the rate of 8% on the costs awarded, however, is silent as to when the date of interest should run.

[10] The learned Deputy Registrar further referred to the case of *Nykredit Mortgage Bank Plc v. Edward Erdman Group Ltd (No. 2)* [1998] 1 All ER 305 where it was held that:

> However desirable it might be for the Court to have power to order the payment of interest on the costs from a date earlier than the date on which the Court gives judgment, I do not think such a power can be squeezed out of this rule (Order 42 r. 3 RHC). This could be to doing indirectly what that Court has no power to so directly. Whether is the ambit of this rule, it cannot be a proper use of the rule to back date a judgment, so far as it relates to costs, with the sole object of thereby bringing into operation statutory judgment debt interest from a date earlier that the date on which in fact judgment was given.

[11] The learned Deputy Registrar held that the date of the interest should commence from the date of the judgment of the Court of Appeal allowing the plaintiff's appeal to reinstate the plaintiff's claim which was struck-out by the High Court.

[12] Based on the above stated reasons, the learned Deputy Registrar held that the rate of interest at 8% be calculated from 11 May 2004 and not from 12 November 1998.

The Plaintiff's Submission

[13] The learned counsel for the plaintiff submitted that when the Court of Appeal allows the appeal and set aside the decision of the High Court, what it means is that the High Court should not have allowed the defendant's appeal but should have in fact dismissed the defendant's appeal. Therefore, the Order of the High Court should have read that the defendant's appeal is dismissed with costs.

[14] It was further submitted that when the Court of Appeal allowed the plaintiff's appeal it means that the costs at the Court of Appeal and the High Court should be given to the plaintiff and to be taxed. The costs in the High Court as at the date of the defendant's appeal was allowed and not from the date of the judgment of the Court of Appeal which allowed the plaintiff's appeal. To interpret it otherwise it would make it nonsense in saying costs to be taxed here and the court below. Therefore, the date when interest begins to run is from the date of the decision of the High Court which reversed the Sessions Court on 12 November 1998.

[15] The learned counsel for the plaintiff further submitted that the learned Deputy Registrar in relying on the case of *Nykredit Mortgage Bank Plc v. Edward Erdman Group (No 2) (supra)* had erred as he failed to read the report in its proper context. The learned Deputy Registrar had read the words 'power to order the payment of interest on costs from a date earlier than the date on which the court gives judgment' wrongly. According to the learned counsel what 'the date on which the court gives judgment' means is judgment at the end of the trial when the court says. 'Plaintiff's claim is allowed with costs to be taxed' that is the date of judgment. The court has no power to order interest on costs as from the date the writ was filed or served. The learned Deputy Registrar should have read the case of *Nykredit Mortgage Bank Plc*

(supra) in line with the House of Lords case of *Hunt M Dougles Roofing Ltd* [1983] All ER 823 which was quoted with approval by the Supreme Court in the case of *Gooi Hock Seng v. Chuah Guat Khim* [2001] 1 CLJ 583 which held as follows:

> for the sake of completeness, I should add that counsel for the respondents strongly argued that an order for payment of costs to be taxed cannot be a judgment debt within s. 17 of the 1838 Act because until taxation has been completed there is no sum for which execution can be levied. This point appears to have been raised in the *Erven Warnink* case and disposed of at the end of the judgment on the basis that the courts have accepted since its enactment that s. 17 does apply to such a judgment and accordingly the law has gone too far for that argument (see [1982] 3 All ER 312 at 320). I agree. This acceptance is because a judgment for costs to be taxed is to be treated in the same way as a judgment for damages to be assessed, where the amount ultimately ascertained is treated as if it was mentioned in the judgment, no further order being required. A judgment debt can therefore in my judgment be construed for the purpose of s. 17 as covering an order for the payment of costs to be taxed.
>
> I accordingly would allow this appeal with costs, both in your Lordships' House and in the courts below and would order that interest on the costs of this action should be payable by the respondents at the appropriate rates from 1 November 1984.

[16] The Supreme Court then in *Gooi Hock Seng (supra)* had this to say:

> a. it is my considered opinion that interest on costs should have been ordered by the learned registrar and I now order that the learned registrar's certificate be amended to include a new item 99 to read as follows:
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> 99. Interest on costs at 8 per cent per annum from the date of judgment of the appeal in the Federal Court on 17 April 1993 till the date of realization.

[17] In *Liau Kim Lian v. Bajuria* [1971] 1 LNS 63, the Federal Court had ruled that upon a true construction of O. 40 r. 11(2) of the Rules, interest is payable where an order directs payment of costs to be taxed and a judgment for damages to be assessed or for costs to be taxed carries interest from the date of entry of judgment and not from the date of assessment or taxation.

[18] The Ipoh High Court in the case of *Sam Hock Ming v. Hong Leong Assurance Sdn Bhd*, Civil Suit No. 23-113-86 said as follows: A

> which held that as to whether interest should run from the date when an order for costs was made or from the date of allocatur in respect of such costs, the court took the view that a judgment for damages to be assessed or for costs to be taxed, carried interest from the date of the said judgment and not from the date of assessment of damages or taxation of costs. B

[19] The learned counsel for the plaintiff further submitted that in the English Rules of the Supreme Court (hereinafter called 'the RSC') in respect of O. 42 r. 3 RSC before interest can be awarded from the date of judgment, the court must order the judgment to be back dated. This is not the position of the law in Malaysia. C

[20] In *Jefford & Another v. Gee* [1970] 1 All ER 1202, the English Court of Appeal in personal injury cases had this to say. D

> (i) interest should be awarded to a plaintiff not as compensation but for being kept out of money which ought to have been paid to him (see p. 1208 a, post).
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> (ii) On special damages interest should, ordinarily, be awarded on the total sum of the special damages from the date of the accident until the date of trial, at half the appropriate rate of interest allowed on the general damages. Any recoupment of special damage from some other quarter should be taken into account in awarding the interest (see p. 1208 b and j to p 1209 a, post). E F
>
> (iii) On damages for pain and suffering and loss of amenities interest should be awarded, at the appropriate rate, from the date of service of the writ to the date of trial (see p. 1209 f, post). G

[21] The question that arises from the above is, has the defendant kept the plaintiff out of the monies he is entitled to by his filing an appeal. When a defendant files an appeal he takes a risk that it may be allowed at the High Court but then the plaintiff has a right to take up the matter to the Court of Appeal. H

[22] In respect of the getting-up fees as per item 27 in the bill of costs the learned deputy registrar had awarded the sum of RM15,000 which in the view of the learned counsel for the plaintiff was too low. Prior to the award of the sum of RM15,000 as getting-up fees, the learned counsel for the plaintiff had asked for the sum of RM30,000 and later on had amended it to claim for RM50,000. I

A It was submitted that although the amendment of the sum for the getting-up fees was at the appeal stage, it should be allowed so long it has not caused any injustice to the defendant and has submitted so in this instance.

B **[23]** The learned counsel for the plaintiff submitted the taxation of costs should be the taxed costs at the High Court and not based on the taxed costs at the Subordinate Courts. References were made to a number of cases for the getting-up fees such as:

C i) *United Malayan Banking Corp Bhd v. Sykt Perumahan Luas Sdn Bhd* [1991] 1 CLJ 594; [1991] 4 CLJ (Rep) 163 where the court allowed a sum of RM65,000 as costs for resisting a foreclosure proceedings.

D ii) *Vincent Cheng Kim Chuan v. The Minister for Home Affairs & Ors* [1992] 2 CLJ 945; [1992] 4 CLJ (Rep) 527 which relates to an originating motion for a writ of *habeas corpus* the Singapore Court awarded a sum of S$65,000 as costs.

E iii) *Tuan Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals* [1997] 1 CLJ 463 which relates to an appeal in the Court of Appeal against a decision of the High Court striking out the statement of claim under O. 18 r. 19(1)(a)(b) and (c) of the RHC, 1980, the Court of Appeal ordered a sum of RM100,000 to be paid as costs.

F **The Defendant's Submission**

[24] The learned counsel for the defendant emphasized that the hearing in respect of the plaintiff's application for a review to the judge-in-chambers was not a rehearing but a review. This has been G stated in the case of *Chan Kok Choon JP v. MBF Finance Bhd* [2000] 4 CLJ 453 where the Court of Appeal held that the learned judge had committed a grave error in treating the review as an appeal.

[25] On the issue as to when the interest of the costs should run, H the learned counsel for the defendant submitted that the awarding of interest is governed by s. 11 of the Civil Law Act, 1956 and also O. 42 r. 7 of RHC, 1980.

[26] Section 11 of the Civil Act 1956 states as follows:

I > In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate

as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment. A

[27] In respect of O. 42 r. 7 RHC, it states as follows:

(1) A judgment or order of the Court takes effect from the day of its date, B

(2) Such a judgment or order shall be dated as of the day on which it is pronounced, given or made, unless the Court orders it to be dated as of some other earlier or later day, in which case it shall be dated as of that other day. C

[28] Order 42 r. 7 RHC is *in pari materia* with the English O. 42 r. 3 of the RSC.

[29] According to the learned counsel for the defendant, the plaintiffs appeal to reinstate the plaintiffs claim was allowed on the 11 May 2004 and therefore, the effective date the said order would be on 11 May 2004. D

[30] Reference was made to the case of *Nykredit Mortgage Bank Plc (supra)* where the House of Lords through the judgment of Lord Nichollas of Birkenhead and referred to by the learned deputy registrar in his reasoning. E

[31] The learned counsel for the defendant further submitted that in the case of *Gooi Hock Seng (supra)*, Abdul Malek FCJ held and directed that the registrar's certificate be amended accordingly to include interest on costs at 8% per annum from date of judgment of the appeal in the Federal Court dated 17 April 1993 to the date of realization. The learned counsel also submitted that in *Liau Kim Lian v. Bajuria (supra)* the Federal Court had ruled that upon a true construction of O. 40 r. 11(2) of the Rules, interest is payable where an order directs payment of costs to be taxed, and a judgment for damages to be assessed or for costs to be taxed, carries interest from the date of entry of judgment and not from the date of assessment or taxation. F G H

[32] On the issue of the getting-up fees of which the learned Deputy Registrar had awarded the sum of RM15,000 and against which the plaintiff is asking me to review, the learned counsel for the defendant submitted that the appeal before the High Court was only a rehearing where most of the argument and preparation had I

A been done at the Sessions Court, The learned counsel for the defendant further submitted that the costs awarded at the High Court should not be too excessive and must commensurate with the award of the Sessions Court. Reference was made to the case of *Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors* [2002] 4 CLJ
B 259; [2002] 3 MLJ 705 where the court held at p. 712 that the major preparations by learned counsel would have been at the High Court level since the taxing party was successful at both the High Court and the Court of Appeal levels, there is really nothing much for them to prepare for the Federal Court appeal and guided by the
C authorities, the quantum of RM40,000 for getting-up fees is confirmed and the interest at 8% per annum on the costs awarded from the date of the judgment of the appeal in the Federal Court on 21 March 2000 up to the date of realization.

D **Finding Of The Court**

[33] On the issue of when interest on the costs should run, the court agrees with the reasoning of the learned Deputy Registrar that the date of interest should commence was from the date of the
E judgment of the Court of Appeal allowing the plaintiff's appeal to reinstate the plaintiff's claim which was struck out by the High Court. The judgment of the Court of Appeal was made on 11 May 2004 and interest should be calculated from the said date realization and not from 12 November 1998. The court is of the considered
F view that it is quite clear that the decisions in *Gooi Hock Seng (supra)*, *Liau Kim Lian (supra)* and *Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors (supra)* that interest is payable as from the date of judgment. With respect the court cannot agree with the reasoning by the learned counsel for the plaintiff when the Court of Appeal
G allowed the plaintiff's appeal it means that interest should be calculated on the date the Court of Appeal order that costs to be taxed here and below and it should run from the date of the decision of the High Court which reversed the decision of the Sessions Court on 12 November 1998. Learned counsel for the
H plaintiff submitted that the date of the judgment means the date when the court allowed the plaintiff's claim with costs to be taxed.

[34] The view expressed by the learned counsel for the plaintiff to my mind cannot be the correct view, because the Federal Court in *Liau Kim Lian (supra)*, *Gooi Hock Seng (supra)* and the *Kerajaan*
I *Negeri Johor (supra)* had held otherwise.

[35] I hereby confirmed the decision of the learned Deputy Registrar on this issue.

[36] On the issue of the amount for getting-up fee in item 27 of the bill of costs, which the learned Deputy Registrar had awarded the sum of RM15,000 and the learned counsel for the plaintiff had amended the said amount to RM50,000 in the midst of this review, the law with regard to the quantum of costs for getting-up fees, is clear in that the authorities dictate that it should not be changed unless there is an error in principle on the part of the taxing registrar in fixing the amount.

[37] In the instant case, despite the persuasive submission of the learned counsel for the defendant, I allowed the getting-up fees to be increased from the sum of RM15,000 to RM25,000.

[38] For the getting-up fees under item 27, the costs to be awarded are at the discretion of the learned Deputy Registrar. And in regard to discretionary costs, the (earned Deputy Registrar shall have regard to all relevant circumstances, in particular, those set out under para. 1(2) of part X of Appendix 1 which is as follows:

> (2) In exercising his discretion under this para or under r. 31(2) in relation to any item, the registrar shall have regard to all relevant circumstances, and in particular to:
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> (a) the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;
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> (b) the skill, specialized knowledge and responsibility required of, and the time and labour expended by, the solicitor or counsel;
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> (c) the number and importance of the documents (however brief) prepared or perused;
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> (d) the place and circumstances in which the business involved is transacted;
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> (e) the importance of the cause or matter to the client;
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> (f) where money or property is involved, its amount or value; and

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(g) any other fees and allowances payable to the solicitor or counsel in respect of other items in the same cause or matter, but only where work done in relation to those items had reduced the work which would otherwise have been necessary in relation to the item in question.

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[39] In this regard, I am of the view that the amount of the getting-up fees should be increased because the efforts made by the learned counsel for the plaintiff would have been more strenuous when appealing to the Court of Appeal against the decision of the High Court. I would have agreed with the submission of the

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learned counsel for the defendant if the decision in the High Court was in favour of the plaintiff and the defendant was appellant therein.

[40] In conclusion and for the reasons as stated above, I hereby

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ruled that the rate of interest was from the date of the decision of the Court of Appeal allowing the plaintiff's appeal to reinstate that plaintiff's claim on 11 May 2004 and as for item 27, the getting-up fees is increased to RM25,000. Enclosure 28 is allowed in part with costs.

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